ARAB MALAYSIAN MERCHANT BANK BHD.

v.

ESSO PRODUCTION MALAYSIA INC.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-23-2684-1988]
9 MARCH 1992

CIVIL PROCEDURE: *Summary judgment factoring agreement - Whether factoring arrangement and an assignment created - Is there an assignment in writing - Whether express notice given - Is it a proper case for summary judgment.*

By a factoring agreement dated 8 May 1985 entered into between the plaintiff and Jovena Sdn. Bhd. (Jovena), Jovena factored its book debts to the plaintiff. By notice dated 21 January 1986 Jovena notified the defendant of the said factoring agreement. The defendant was also notified of the factoring agreement *vide* notice dated 4 September 1986. The defendant, in acknowledgment of the said factoring agreement entered into a deed of indemnity with Jovena and the plaintiff on 3 February 1986. Some invoices to the defendant had the legend.

As at 24 May 1988 invoices bearing a face value of RM2,838,934.49 remained due and unpaid by the defendant.

Held:

[1] The factoring agreement in this case is a facultative agreement. It is termed "facultative" because, although the client is bound by the agreement to offer every debt arising from sales in the normal course of its business the factor may accept or decline to accept any debt.

[2] The factoring agreement itself does not constitute an assignment of the debts. It is implicit in the factoring agreement that the assignment is to be done by a separate act.

[3] The legend is only a notice of assignment. The letter dated 21 January 1986 only notified the defendant that Jovena had entered into an arrangement with the plaintiff whereby Jovena's "receivables" are assigned to the plaintiff. The letter itself does not constitute an assignment.

[4] The letter of indemnity was signed on 3 February 1986, there was no written assignment yet. Since there is no documentary evidence of a written assignment, the plaintiff is not entitled to summary judgment in this case.

[5] Section 4(3) of the Civil Law Act requires that express notice be given to the debtor. Those invoices which do not bear the legend failed to comply with the requirement of the Act. Having considered the pleadings and all the evidence in this case this is not a proper case for summary judgment.

[Appeal allowed with costs.]

Legislation referred to:
Civil Law Act 1956, s. 4(3)

Other sources referred to:
F.R. Salinger, Factoring Law & Practice 1991 p. 131
P.M. Biscoe, Law and Practice of Credit Factoring 1975
S. Criohton & C. Ferrier, Understanding Factoring and Trade Credit

For the plaintif - V. Kumar; M/s. Kumar Jaspal Quah & Aishah
For the defendant - Davidson; M/s. Azman, Davidson & Co.

JUDGMENT

Zakaria Yatim J:

This is an appeal by the defendant against the decision of the Senior Assistant Registrar given on 31 July 1989 ordering that the plaintiff be at liberty to sign final judgment against the defendant for a sum of RM2,511,751.09.

After hearing the appeal in chambers, I allowed the appeal with costs. At the request of the plaintif, I adjourned the matter into open Court for further argument.

The plaintiff's case as pleaded in the statement of claim is as follows:

By factoring agreement dated 8 May 1985 entered into between the plaintiff and Jovena Sdn. Bhd. (Jovena), Jovena factored its book debts to the plaintif. Pursuant to the said factoring facility and factoring and purchase of the book debts by the plaintiff, Jovena appointed the plaintiff as their attorney for the purpose of collecting all debts arising out of factored invoices due and owing to Jovena and assigned the said debts/invoices to the plaintiff. By notice dated 21 January 1986 Jovena notified the defendant of the said factoring agreement. The plaintiff also notified the defendant of the factoring agreement *vide* notice dated 4 September 1986. The defendant, in acknowledgement of the said factoring agreement, entered into a deed of indemnity with Jovena and the plaintiff on 3 February 1986. In pursuance of the factoring agreement the plaintif proceeded with the purchase of invoices rendered by Jovena to the plaintiff by giving good consideration for all invoices to the defendant and acknowledged by the defendant bearing the legend:

> This invoice has been assigned to Arab Malaysian Merchant Bank Bhd. Payment to be made on to Jovena Account No. 101554165 Arab Malaysian Merchant Bank Bhd.

The plaintiff rendered monthly statements to the defendant of all invoices factored to the plaintiff by Jovena wherein *inter alia* it was provided that any discrepancy/dispute/claims should be referred to the plaintif within fourteen days failing which the statement would be deemed correct. As at May 24 1988 invoices having a face value of RM2,838,934.49 full particulars of which are within the knowledge of the defendant, remained due and unpaid by the defendant. By notice dated 27 September 1988 the plaintiff through their solicitors requested the defendant to settle the said amount.

The defendant, in its amended statement of defence (encl. 8) denied any knowledge of the factoring agreement but admitted receiving the notice dated 21 January 1986 from Jovena. The defendant denied, however receiving the letter dated 4 September 1986 from the plaintiff. According to the plaintiff in that letter they notified the defendant of the factoring agreement. According to the defendant the notice dated 21 January 1986 which was sent by Jovena was endorsed "not acceptable" by the defendant and returned to the plaintiff. The defendant contended that the said factoring agreement was not accepted by the defendant and the plaintiff had acquired no rights against the defendant under the said agreement. The defendant admitted entering into two letters of indemnity in February 1986 in respect of Contract No. 5667 dated 3 February 1986 and in respect of Contract No. 5669 with Jovena and the plaintiff. The defendant, however denied that the said letters of indemnity were in acknowledgment of the factoring agreement. With regard to the letters of indemnity, the defendant averred that Jovena had entered into two contracts with the defendant for the provision of catering and associated services on board the defendant's off-shore platforms. The particulars of the two contracts are as follows:

Contract	*No.Date*	*Period of validity*
5667	1 December 1985	to 24 April 1988
5669	1 December 1985	to 30 November 1986

According to the defendant both contracts contained a provision to the effect that Jovena "shall not assign the said contracts or any part thereof without the written approval of the defendant". The defendant conceded that by the said letters of indemnity it consented to an assignment by Jovena to the plaintiff of certain rights under the said contracts but stated that the assignment was limited to the assignment of payments due from the defendant to Jovena in respect of works rendered under the said contracts and did not amount to an assignment of all rights under the said contracts, in particular it did not amount to an assignment of the right to claim damages for breach of contract. The defendant admitted that it received invoices from Jovena in respect of payments claimed pursuant to the said contracts bearing the legend referred to in the statement of claim. Pursuant to the said legend the defendant did make payment of the undisputed amounts to Jovena Account No. 101554166 with the plaintif and not Jovena Account Number 101554165 as stated in the statement of claim. The defendant said it did not consent to any assignment of benefits under the said contracts and the "purported assignment of invoices is void and ineffective... ". Assuming the assignment was valid, it amounted to an equitable assignment of a legal chose in action and the plaintiff could not bring the present action unless Jovena is added as a party.

The defendant admitted that as at 24 May 1988, claims included in the said invoices amounting to RM2,838,934.49 had not been paid. The defendant denied that it was liable to pay in respect of the said invoices because the said invoices were outside the scope of the letters of indemnity. The defendant averred major portion of the claims were for reimbursement of meals and laundry expenses incurred by Jovena for its staff under the contracts. According to the defendant, at all material times it notified Jovena that it disputed the said claims. The defendant admitted that the sums of RM282,225.80 and RM218,479.44 were due and owing to Jovena. The defendant also claimed the right to set-off a sum of RM3,896.52 against any moneys due to the plaintiff.

For the purpose of the present case I accept the views of commentators that the law governing factoring arrangement is the law of assignment. See F.R. Salinger, *Factoring Law & Practice 1991* p. 131; and P.M. Biscoe, *Law and Practice of Credit Factoring*, 1975 and S. Crichton & C. Ferrier, Understanding Factoring and Trade Credit.

The first question to consider is whether the factoring agreement dated 8 May 1985 creates a factoring arrangement and an assignment.

Mr. Davidson, Counsel for the defendant, in his written submission said that the factoring agreement could not amount to an assignment in itself because there was no indication which debts had been allegedly assigned by it and by virtue of clause 2(a) of the factoring agreement the plaintiff had an absolute discretion as to which of the debts the plaintiff wished to accept. Therefore, he said, both the requirements necessary to make the agreement operate as an assignment were not satisfied.

Mr. Kumar, Counsel for the plaintiff, in his written submission said that:

> ... on 8 May 1985 Jovena entered into a factoring agreement with the plaintiff wherein **it was agreed** that Jovena would sell all its receivable and book debts which in fact were the invoices Jovena raised to the defendant ...
> (Emphasis added)

It is now necessary to examine the factoring agreement itself.

Clause 1 states as follows:

> The Client hereby **agrees to offer to sell** to the bank ... all debts from time to time owing to the client by customers of the client ... arising out of credit sales or otherwise ... (Emphasis Added)

Clause 2 states:

> The bank may in its **absolute discretion** after making such enquiries **as it deems fit accepts any of the debts offered** to the bank by communicating its acceptance ... to the client ... (Emphasis Added)

Clause 15 provides:

> 15. The client shall whenever requested by the bank in writing to do so forthwith at the client's cost, execute, stamp and deliver to the bank a deed in a form approved by the bank assigning to the bank any purchased debt, together with the benefit of all guarantees or other securities for or in respect of the same and shall if requested by the bank forthwith give notice in writing of any such assignment to any customer whose debt is thereby assigned.

Under the agreement, the word "client" refers to Jovena and "the bank" refers to the plaintiff. The agreement is silent as to who the "customers" are.

I agree with Mr. Davidson that the factoring agreement in the present case is a facultative agreement. It is termed "facultative" because, although the client is bound by the agreement **to offer every debt** arising from sales in the normal course of its business, **the factor may accept or decline to accept any debt.** *Salinger supra.* p. 135. At p. 136, the learned author said:

> ... The absolute right to decline any debt was thought to give the factor better security; if the prospects of recovery from the debt were doubtful he need not have the responsibility of paying for it...The facultative agreement itself gives the factor no real rights as regards the debt; but, apart from containing the factor's contractual right to have the debts covered by the agreement offered to him, the agreement also includes the rights and obligations of the parties in relation to every debt upon its **being assigned to the factor by a separate act.** (Emphasis Added)

In my opinion, the factoring agreement itself does not constitute an assignment of the debts. It is implicit in the factoring agreement that the assignment is to be done by a separate act.

What then is this separate act in the present case?

Mr. Kumar, in his oral submission in open Court said:

> What creates the actual assignment is the endorsement on the invoices - It creates assignment. Factoring agreement is master agreement. Actual assignment covered... by that invoice.

Mr. Davidson, in his written submission seems to agree with Mr. Kumar but he qualified by saying that the legend constitutes an equitable assignment.

In his subsequent written submission Mr. Kumar referred to the legend as a notice of assignment. In my opinion the legend is only a notice of assignment. P.M. Biscoe, *supra.*, at pp. 100 and 101 said:

> The principal method used in factoring to give notice of assignment is by printing, typing, stamping or sticking it on the invoice. Usually the client attends to the placing of notices on invoices and their mailing to customers. As an additional precaution, notice of assignment may also be contained on statements of account sent to the customer by the factor. A typical

notice of assignment on an invoice would say that 'the debt due under this invoice has been assigned to and is payable only to our factors X Factors Limited, of (address) whose receipt alone will be recognised.' As regards debts already invoiced and on the sales ledger and assigned to the factor at the commencement of factoring notice is typically given in a letter from client or factor to the customer.

If the legend serves only as a notice of assignment, then where is the assignment proper. Section 4(3) of the Civil Law Act 1956 requires that the assignment must be in writing under the hand of the assignor.

In his written submission, Mr. Kumar said that the "... requirement of writing is clearly satisfied by the notification letter dated 21 January 1986 which the defendant does not deny receipt ...". He added that "... this requirement of writing is also satisfied by the 'legend' appearing on every invoice which the defendant has admitted in its pleadings and also in submission." He said that in both instances the writing was "under the hand of the assignor".

With respect, Mr. Kumar's argument appears to be inconsistent. At one stage he referred to the legend as a notice of assignment. Subsequently, he referred to the legend as the assignment proper. I have already stated earlier that the legend is only a notice of assignment. It cannot be regarded as the assignment proper.

I shall next examine whether the letter dated 21 January 1986 which was written by Jovena to the defendant, constitutes an assignment. The said letter is reproduced below:

Management Accountant,
Esso Production Malaysia Inc.,
14th Floor, Wisma MCA,
Jalan Ampang,
Kuala Lumpur.

(Attn: Encik Ku Ahmad).

Dear Sirs,

This is to inform you that we have acquired the services of Arab Malaysian Merchant Bank Bhd. (AMMB) as credit factors who have under our arrangement with them agreed to purchase our debts due from you, now and in future. Under this arrangement which takes immediate effect, we will invoice you as usual for all goods delivered. On each of our invoices we will stamp AMMB's legend as follows, 'Payable to Arab Malaysian Bank Bhd., 3rd. Floor, Ghee Hong Building, No. 47 Jalan Ampang, Kuala Lumpur, who has acquired this account. Remittance is to be made directly to them'.

Hence, all remittances in respect of invoices sent to you by us should now be made directly to AMMB Factoring, who under our arrangement with them have been assigned all our present and future receivables under credit sales. Only payment to AMMB Factoring will constitute a proper discharge of your debts.

We further confirm that any payments made by you to AMMB Factoring pursuant to this letter shall be deemed to be payments made to us and that we shall have no claim against you in respect thereof.

You should immediately pay and continue to pay to AMMB Factoring all sums due in respect of all invoices from us whether stamped or not with AMMB's legend, as and when the same become due and payable, until such time as AMMB shall notify you in writing to the contrary.

Kindly confirm that the outstanding amount of RM338,686.75 as at 21 January 1986 is correct.

We apologise for any inconvenience caused by this request but we assure you that the arrangement we have entered with AMMB will enable us to serve your needs more efficiently.

Yours sincerely,

Sgd/- Saidi Suari
Executive Director.
c.c.: AMMB - Factoring

We acknowledge that we have notice of the above factoring arrangement between Arab Malaysian Merchant Bank Bhd. and Jovena Sdn. Bhd. and confirm that the above outstanding amount is correct.

...

Authorised Signature & Co's Stamp.

The above letter was received by the defendant but the letter was not acceptable to the defendant.

In my view the above letter is only a letter notifying the defendant that Jovena had entered into an arrangement with the plaintif whereby Jovena's "receivables" were assigned to the plaintiff. The letter itself does not constitute an assignment. The question is, where is the written assignment referred to in that letter. I am unable to find any documentary evidence on assignment in this case.

In para. 3 of the statement of claim, the plaintif stated *inter alia*:

> By factoring agreement dated 8 May 1985 entered into between the plaintiff and Jovena Sdn. Bhd. (hereinafter called the said company) the said company factored its book debts to the plaintiff and pursuant to the said factoring facility and of factoring and purchase of the book debts by the plaintiff, **the company *inter alia* appointed the plaintif as their attorney for the purpose of collecting all debts arising out of factored invoices due and owing to the said company as well as assigned the said debts/invoices to the plaintif**.
> (Emphasis added)

In para. 3 of the statement of claim above the plaintiff averred that Jovena appointed the plaintiff as its attorney for the purpose of collecting all debts as well as assigned the said debts to the plaintiff. But I have examined all the documentary exhibits and I find no document of a power of attorney, or a document under the hand of Jovena assigning the said debts to the plaintiff. The Court cannot rely on a mere averment in the statement of claim without any documentary evidence. This is especially so when the defendant disputed that there was such an assignment.

Mr. Kumar referred to the letter of indemnity dated 3 February 1986 and said that the defendant had "acknowledged the assignment." The letter of indemnity, which was signed by Jovena and the defendant, *inter alia* states:

> Esso Production Malaysia Inc., a company incorporated in Delaware, U.S.A. and having its registered office at Complex Antarabangsa, Jalan Sultan Ismail, Kuala Lumpur (hereinafter referred to as "EMPI"), hereby **acknowledges** and **consents to Jovena Sdn. Bhd.**, a company incorporated in Malaysia and having its registered office at Block D, Lot 14, 3rd. Floor, Sedco Complex, Kota Kinabalu, SABAH (hereinafter referred to as "Assignor"), **proposal to assign** all payments due from EMPI to Assignor in respect of the work rendered under contract No. 5669 (hereinafter referred to as "work") to Arab Malaysian Merchant Bank, a company incorporated in Malaysia and having its registered office at 4th Floor, Bangunan Dato' Zainal, Jalan Melaka, Kuala Lumpur (hereinafter referred to as "assignee") subject to the following condition...
>
> (Emphasis added)

With respect, I think Mr. Kumar was not quite correct when he said that the defendant acknowledged the assignment. In the above paragraph, the defendant merely acknowledged and consented to **a proposal to assign.** In my view when the letter of indemnity was signed on **3 February 1986**, there was no written assignment yet. This view supports my earlier finding that the letter dated 21 January 1986, (which was written before the letter of indemnity was signed), does not constitute an assignment.

In my view, since there is no documentary evidence of a written assignment, the plaintiff is not entitled to summary judgment in this case.

If this view is wrong, and the factoring agreement itself or the letter dated 21 January 1986 constitutes an assignment, the question is whether notice of the assignment has been given to the defendant?

Mr. Davidson said not all the invoices bore the legend. I have examined a good number of the invoices exhibited to the affidavit of the defendant (enclause 6) and I find that most of them do not bear the legend. I have also examined the invoices exhibited to the plaintiff's affidavit in support of the O. 14 application (encl. 5) and I find that many of them do not bear the legend. Section 4(3) of Civil Law Act requires that express notice be given to the debtor. Those invoices which do not bear the legend failed to comply with the requirement of the Act and the plaintif is not entitled to summary judgment in respect of such invoices.

The next question to consider is whether the invoices which bear the legend were sent to the defendant. In the amended statement of defence the defendant admitted receiving the invoices which bear the legend but said that it had made payments in respect of the undisputed amounts.

From the amended statement of defence the defendant said that the disputed claims arose out of claims made by Jovena against the defendants, the major portion of which claims was for reimbursement of alleged meal and laundry expenses incurred by Jovena for its own staff under the contracts entered into between Jovena and the defendant. The defendant averred that these expenses which were disputed by the defendant amounted to RM2,556,708.69 which is equivalent to the amount claimed by the plaintiff. Clause 6.2 of Contract No. 5667 provides:

> 6.2 For that part of the work that is to be performed at the platform, EPMI shall furnish or cause to be furnished at its own expense the following items:
>
> 1) Transportation for Contract Equipment and Contractor's personnel to and from the platform in accordance with Article 7.0.
>
> 2) Reasonable accommodation, meals and laundry service for Contractor's personnel within the limits of stated requirements as to numbers of personnel so engaged from time to time. Contractor's personnel will adhere to meal rosters as may be furnished by EPMI to prevent overcrowding of the facilities. Accommodation for all Contractor's personnel, including supervisors, will normally be in four - berth units.

Although Jovena is entitled to claim expenses for meals and laundry services it must be reasonable. The question of what is "Reasonable accommodation, meals and laundry service ..." cannot be determined now especially when the amount alleged by the defendant is a large sum. In my view this matter can only be determined at the trial.

Mr. Kumar submitted that the defendant did not inform the plaintiff promptly or within reasonable time regarding the alleged discrepancies in the invoices. He contended that the defendant was estopped from alleging such discrepancies. I do not think the plaintiff can rely on the doctrine of estoppel because estoppel does not appear in the pleadings.

In the statement of claim the plaintiff said that monthly statements of all invoices factored to the plaintiff by Jovena were sent to the defendant. The defendant, in its affidavit (encl. 40) denied receiving such statements. Para. 4 of the affidavit states:

> I reiterate that we had always stated in no uncertain terms that EPMI did not receive any statements from AMMB or Jovena pertaining to the factoring arrangement except for the copies one of which was the March statement which was received as a result of the request made in para. 3 above and the second statement for the month of May received from AMMB, as a result of the request made to Jovena at a meeting with them on 5 June 1988.

At the hearing in chambers, Mr. Davidson said:

> Statement sent to wrong address. Address on top left of exhibit is Kemasik, Terengganu. The correct address for all contractual transactions is p. 101 of enclosure to para. 17.

The address of the defendant referred to in the affidavit is:

> Esso Production Malaysia Inc.,
> 14th Floor, Wisma MCA,
> Jalan Ampang,
> Kuala Lumpur.

I have seen some of the statements exhibited to the defendant's affidavit and I note that the statements were sent to Kemasik, Terengganu.

Having considered pleadings and all the evidence in this case I am satisfied that this is not a proper case for summary judgment. I therefore confirm the decision I made in chambers earlier. The plaintif will pay the costs of further argument to the defendant.

Also found at [1992] 2 CLJ 989